U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 05 March 2004

CASE NO.: 2003-LHC-515

OWCP NO.: 01-152629

IN THE MATTER OF:

JAMES W. GLENN, SR.

Claimant

v.

ELECTRIC BOAT CORPORATION

Self-Insured Employer

APPEARANCES:

CAROLYN P. KELLY, ESQ.

For The Claimant

EDWARD W. MURPHY, ESQ.

For The Employer

BEFORE: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by James W. Glenn, Sr. (Claimant) against Electric Boat Corporation (Self-Insured Employer).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on July 25, 2003, in New London, Connecticut. All parties were afforded a

full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered 20 exhibits, Employer/Carrier proffered 27 exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[1]

Post-hearing briefs were received from the Claimant and the Employer on September 17, 2003. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-1), and I find:

1. That the Claimant was injured prior to March 23, 2001.

2. That Claimant's injury occurred during the course and scope of his employment with Employer.

3. That there existed an employee-employer relationship at the time of the accident/injury.

4. That the Employer was notified of the accident/injury on March 23, 2001.

5. That Employer filed a Notice of Controversion on March 29, 2001.

6. That an informal conference before the District Director was held on November 6, 2002.

7. That Claimant's average weekly wage at the time of injury was $771.33.

9. That Claimant reached maximum medical improvement on February 6, 2002.

[1] References to the transcript and exhibits are as follows: Transcript: Tr.___; Claimant's Exhibits: CX-___; Employer's Exhibits: EX-___; and Joint Exhibit: JX-___.

II. ISSUES

The unresolved issues presented by the parties are:

1. The extent of Claimant's disability.

2. Whether a superceding cause relieved Employer of liability to Claimant.

3. Attorney's fees and interest.

III. STATEMENT OF THE CASE

The Testimonial Evidence

Claimant

Claimant testified that his date of birth is October 8, 1946. He completed the ninth grade of formal education and entered the U.S. Navy. He did not complete a GED. (Tr. 22).

He began employment with Employer in March 1971 learning to weld submarine sections. (Tr. 22). He transferred into the maintenance department in 1976 where he worked in an indoor/outdoor environment constructing and repairing stairways and railings. He "flexed" to submarines after 17 years in the maintenance department but continued to "service and ship fitters." (Tr. 23).

Claimant testified that he had prior injuries to his knees for which kneeling, squatting and crawling restrictions were assigned. Employer allowed him to leave his work site about 12 minutes early to "walk up the hill" to catch his ride home at the end of the workday. (Tr. 24). Claimant stated the accommodation was because of his shortness of breath and knees. Claimant also thought he had a hand problem which tested "defective" on MRI. (Tr. 25).

Claimant testified that throughout his career at Employer he bumped his head in low and tight spots and his supervisor engaged in "horseplay" grabbing him around his neck "many, many, many times." (Tr. 26, 36). In February 2001, Claimant stated he had a lower back injury while "going in and out of a ladder inside the tank with his [welding gear, box, shield and stinger] over my shoulder." The equipment weighed about 15 pounds. (Tr. 27). In the summer 2001, Claimant went to physical therapy and took Vioxx for his neck and back problems. (Tr. 28).

In September 2001, Claimant went to Dr. Kamireddy for his breathing problems which he had since 1998 and was put in the hospital for about three days to take oxygen. (Tr. 29-30). Claimant began treating with Dr. Buckley for his breathing problems after Dr. Kamireddy retired. (Tr. 30). Dr. Buckley put him in Lawrence & Memorial Hospital for a heart problem and ultimately he had a valve replacement. (Tr. 31-32). He remained hospitalized for ten days and went through 20 days of rehabilitation. Dr. Milstein told him he could not go back to work. (Tr. 32).

Claimant testified he can sit comfortably for one-half hour before he has to get up and walk because of pain in his back and neck. He can walk comfortably for 20 to 25 minutes before his hips and back "weaken," causing him to have to sit down. He stated there was no way he could return to his former job at Employer because of his shortness of breath and pain. (Tr. 35). He has good days and bad days, but could not predict when he would have a bad day. On a bad day, he sits on a rocking chair with a heating pad. (Tr. 36). He estimated having a couple of bad days a week during the winter months. (Tr. 59).

Claimant testified he has a medical disability from Employer which "was signed off on" by Dr. Katherine Johnson, the head doctor at Employer. Claimant also receives Social Security disability benefits. (Tr. 37).

On cross-examination, Claimant acknowledged he was deposed on April 17, 2003, and "could have" stated in his deposition that he could sit comfortably for one hour at a time before he would have to get up and stretch.

Claimant also affirmed that he had pains in his back for many years while employed at Electric Boat. (Tr. 38). Claimant explained that in March 2001 he felt a sharp pain in his "lower back with my welding gear going up and down the ladder." He confirmed he returned to work later that day and did not miss any time from work as a result of the injury. (Tr. 39).

Claimant initially went to Dr. Tauro in January 2001 with complaints of pain in his arms and hands. (Tr. 39). He treated with Dr. Tauro on two other occasions, in February 2001 and did not return until October 2002, which was the extent of his back and neck treatment. Claimant agreed that he worked the last ten years for Employer with "some back and neck problems." (Tr. 40). He was able to perform his job despite his back, neck and

knee problems with restrictions and good attendance. (Tr. 41-42).

Claimant affirmed that the only reason he left employment in September 2001, which is the last time he worked for Employer, was because of his breathing and heart problems. (Tr. 43-45). He acknowledged that since his aortic valve replacement his breathing and heart conditions have improved "to a point." (Tr. 45).

Claimant has been encouraged to walk and can walk around a local high school track four times or one mile. He stated his neck and back give out after that distance and he has to stop. He also walks for about one-half hour in a local casino once or twice a week. (Tr. 46). He affirmed he can stand for one hour comfortably before he has to sit down and has no problems driving. (Tr. 47).

He also uses a riding lawn mower and push mower on his lawn as well as a leaf blower. (Tr. 48). Claimant does some vacuuming around his house, can do wash and laundry and grocery shopping. His hobby is sharpening chain saws for friends and neighbors from which he made $10.00 to $12.00 in 2003 and $10.00 to $40.00 or under $100.00 in 2002. (Tr. 49-50). Claimant uses a computer at home, but is "not too keen on using it." He reads newspapers, magazines and parts books regularly. (Tr. 50-51). He keeps track of his own finances and pays his own bills. He has never been told by a doctor or expert that he has a learning disability. (Tr. 51).

Claimant attended the Ambit Welding School at Electric Boat for two months before being hired by Employer. He thought he followed orders and directions well while with Employer. (Tr. 52). He helped train other welders in spray arc and mig welding over the years. (Tr. 53).

Claimant testified he did not think he could work a part-time job—"my mind says yes, but my body doesn't." In his deposition, Claimant responded "if anything, part-time," when asked if he thought he could work a job. (Tr. 53). He did not think he could perform a part-time driving job because he can "drive for about a half hour, 40 minutes, and I've got to get out and stretch . . . walk a little bit." He affirmed his testimony in deposition that he has no problems driving, but added "for short distances." (Tr. 54). Claimant has not applied for work anywhere since he left Employer in September

2001. He confirmed he worked as a security guard part-time when he was "younger and well." (Tr. 55).

Claimant stated that he is receiving "short term disability" benefits from Electric Boat in the approximate amount of $1,216.00 [per month], which apparently converts to retirement benefits at age 62 or 65. (Tr. 56). He has received $1,545.00 per month in Social Security disability benefits since March 2002. (Tr. 57).

Claimant testified that his neck and back conditions have changed over the years because they seem to "hang on longer and longer and longer as you get older." He stated he might not be able to show up every day for work at a part-time job, "depending on my body." (Tr. 58).

The Vocational Evidence

Elizabeth Sinatro

Ms. Sinatro is employed by Concentra Integrated Services as a certified rehabilitation counselor and vocational case manager. (Tr. 60-61). She was accepted as an expert in the field of vocational rehabilitation counseling. (Tr. 63). She was retained by Employer to conduct a vocational assessment of Claimant and labor market survey of suitable alternative employment. (Tr. 64-65). She met with Claimant on July 10, 2003 and discussed his medical background, work and education history, his physical and vocational status, and family activities, hobbies, interests and daily activities. (Tr. 65).

Ms. Sinatro prepared a labor market survey on June 20, 2003, before she interviewed Claimant. (Tr. 66, 98; EX-27). She opined that Claimant's work as a welder was medium in exertional demands and his duties in maintenance were heavy. (EX-27, p. 5). She concentrated on two occupations, security guard and driver, within a 50-mile radius of Claimant's residence of Norwich, CT. (Tr. 66).

She identified five security guard jobs and three driver positions which she testified were within Claimant's restrictions as she understood them for all of his medical problems including his neck, back, lungs and heart. Although security guard jobs are classified as light in physical demands by The Dictionary of Occupational Titles and delivery driver positions are considered medium, Ms. Sinatro testified she "confirmed" with potential employers that such jobs were

sedentary in exertional requirements. (EX-27, p. 2). She stated that each of the jobs were open and available at the time of her labor market survey. (Tr. 67). Certain jobs were available as part-time and full-time positions, part-time being 20 hours of work per week. She included part-time work because Claimant indicated in his deposition "that he feels he may be able to work part-time." (Tr. 68).

Ms. Sinatro opined, to a reasonable degree of certainty, that Claimant has an earning capacity from the date of her labor market survey to present and is capable of competing for the jobs identified in her survey. (Tr. 69). She further opined that it is realistically likely that Claimant can actually obtain the positions set forth in the survey based on his past work ethics, continuous work history and capability of "completing some activities." (Tr. 70). She also opined that Claimant could realistically keep and maintain such jobs, again based on his past work history and ethics. (Tr. 70-71).

Ms. Sinatro estimated Claimant's earnings potential in the range of $7.00 to $10.00 an hour at the time of the job survey, but, as adjusted to his March 2001 job injury, from $6.50 to $9.50 per hour. (Tr. 71). Her research revealed the security guard jobs paid in the range of $7.00 to $11.00 and $6.70 to $10.75 for driving positions in 2002. (Tr. 71-72).

She adhered to the medical restrictions of sedentary work when preparing the labor market survey. She confirmed with potential employers that "experience preferred" is not a requirement and Claimant's lack of a high school diploma or GED was not a requirement for the identified jobs. (Tr. 68, 72).

The security guard job at the Mohegan Sun Casino, which required the employee to "protect patrons and establishment from illegal activity," was described as "basically to observe and report any type of criminal, illegal or suspicious activity." (Tr. 72; EX-27, p. 4).

She was aware of Claimant's restrictions in 2002 and opined that he had an earning capacity from February 2002 until the date of her labor market survey based on the availability of similar job opportunities. (Tr. 73). Security and driving jobs were open and available in the same geographical area throughout 2002. (Tr. 74).

On cross-examination, Ms. Sinatro testified that if a doctor opined Claimant should not go back to work that she would

not disagree with such an opinion. (Tr. 75-76). She stated that Claimant's absence from the work force for two years would not affect his ability to obtain employment and that he realistically would be able to get a job, notwithstanding the high unemployment rate. (Tr. 76-78).

Ms. Sinatro testified that since Claimant's current "functionality" is at the sedentary level, she concentrated on jobs which were sedentary in nature. She reviewed and followed the specific restrictions outlined by Dr. Willetts in identifying suitable alternative employment positions. She inquired of the physical restrictions of the security guard positions and they are within Claimant's restrictions as assigned by Dr. Willetts. (Tr. 96). She stated that Claimant's restrictions required an ability to sit, stand, walk and change positions frequently. (Tr. 97).

Ace Security in the Waterford, CT area had no jobs at the address listed in the labor market survey and would not provide any specifics of any jobs to Ms. Sinatro. Ace Security confirmed that it had jobs within Claimant's restrictions. (Tr. 79). She testified, when asked how much walking would be involved in any positions for Ace, that Ace Security reported the jobs would be within Claimant's work restrictions. She further expounded that "limited walking would be like a surveillance monitor which they do employ there." She responded affirmatively when asked if Ace had a job as a monitor, but Ace would not relate any specifics, which was company policy.[2] She confirmed that she was not able to visit any ACE sites where any jobs were being performed and did not know if Claimant would have to climb stairs at any such jobs. (Tr. 80). She testified that Claimant would not have to crawl or kneel because she was able to confirm the absence of such activity. (Tr. 80-81). The labor market survey regarding Ace Security did not provide any specifics about physical demands or requirements for any jobs. (EX-27, p. 3).

Ms. Sinatro affirmed it is important for an employee to be reliable and stated that Claimant demonstrated "for the entire length of his work history that he was a dependable employee." Although Claimant's reliability occurred before his health conditions "came to bear on him," Ms. Sinatro opined work conditioning may be of assistance to Claimant in returning to work. (Tr. 81-82). She inconsistently testified that the

[2] The labor market survey does not specifically list a surveillance monitor position. (EX-27, p. 3).

security jobs were not temporary, but permanent full-time jobs, although the survey indicates that jobs are also part-time in nature. (Tr. 82; EX-27, p. 3).

Lux Bond and Green employed security guards at their store at the Mohegan Sun Casino. The security guard monitors and reports any thefts to management. The Mohegan Sun employs its own police force for apprehension of persons suspected of stealing. (Tr. 84). The labor market survey does not provide any specifics of the physical requirements of the job. (EX-27, p. 3).

The security guard position at Fatima Hospital described in the labor market survey did not provide any details of the physical demands of the job. (EX-27, p. 3).

Lance Investigations employed security guards in "a variety of security positions" and provided a vehicle for the employee to complete "vehicle checks of low income housing with exiting the car, completing some foot checks but it was a variety of driving and/or walking." Ms. Sinatro did not know the area which would have to be covered by walking or if stairs were involved. Illegal activities would be reported to local police authorities. No physical job requirements were described. (Tr. 85; EX-27, p. 4).

The Mohegan Sun Casino also employed a variety of security guards who were required to write detailed reports of shift activity "in a clear and concise manner." (Tr. 85-86). Although a prospective employee would be expected to "safeguard money, chips and assets that are transported throughout the facility," such positions are not commissioned or required to carry firearms and not required to lift the money, chips and assets. (Tr. 97-98). No specifics of the job's physical demands were provided. (EX-27, p. 4).

The delivery driver job at Papa Gino's was listed as part-time or full-time employment. The employee provided his own transportation and had to have a "flexible schedule." The position was considered sedentary with "no lifting over 10 pounds, no push/pull over 50 pounds, no squat/kneel/crawl and the ability to change positions occasionally." (EX-27, p. 5).

The Avis-Rent-A-Car driver job was a part-time or full-time position but provided no physical demands of the job. The prospective employee "must be dependable."

The Floral Express, Inc. delivery driver job was listed as only on a part-time basis, 20 hours per week. Floral pieces are small and do not exceed 10 pounds. No other specific details of the physical job requirements were described. (EX-27, p. 6).

Ms. Sinatro testified she was not taking a position that Claimant could work full-time, but he testified, if he could work at all, it would be part-time or 20 hours per week. (Tr. 86). She stated Drs. Milstein, Buckley and Willetts opined that Claimant could work full-time at sedentary work activity. (Tr. 87). However, she affirmed that Dr. Milstein opined on January 17, 2002, that Claimant had no expected return to work. (Tr. 87-88; EX-26, p. 2).

On re-direct examination, Ms. Sinatro testified she considered Claimant's ability to engage in stair climbing "to some extent" and did not believe he was severely restricted from climbing stairs. She observed Claimant ascending three flights of stairs on July 10, 2003, when she met with Claimant. (Tr. 88). She opined that Claimant was capable of working on a full-time basis in the various positions identified as suitable employment. She testified that even though Dr. Milstein opined Claimant was not expected to return to work, "it doesn't mean it's not possible . . . and the doctor . . . may have been suggesting that specifically towards his job at Electric Boat, not other employment." She expressed the same opinion about Dr. Buckley's prognosis of May 28, 2002, that Claimant was not expected to return to work. (Tr. 92; CX-17, p. 2).

Ms. Sinatro did not seek to clarify the opinions of Drs. Milstein or Buckley, but followed the projection of sedentary work activity. She was not "100%" certain what the qualification of 60-70% of "moderate limitation of functional capacity; . . . sedentary activity" meant on the physician's statements and did not seek to ascertain its meaning. (Tr. 93-94, 99). She noted however that on August 29, 2002, Dr. Buckley opined Claimant was not capable of working as a welder because of a combination of his cardiac status, orthopedic disabilities and lung impairment. (Tr. 94; EX-20).

Based on her labor market survey, Ms. Sinatro opined that Claimant could earn $280.00 to $400.00 per week as a **full-time** security guard and $280.00 to $346.00 per week as a **full-time** delivery driver. (EX-27, pp. 5-6).

The Medical Evidence

Dr. William R. Cambridge

Dr. Cambridge treated Claimant for a work-related left knee injury and on April 24, 1995 permitted him to return to light duty with assigned restrictions of no crawling, twisting or kneeling for one year. (EX-1). On April 23, 1996, Dr. Cambridge allowed Claimant to return to work with an accommodation of being allowed to "walk up the hill 12 minutes early." (EX-3). On April 24, 2001, Dr. Cambridge opined that Claimant had progressive deterioration of both knees, bilateral effusions and some grinding. Claimant's restrictions and accommodations were renewed. (CX-9).

Dr. Philo F. Willetts, Jr.

At the behest of Employer, Dr. Willetts, a board-certified orthopedic surgeon, examined Claimant on May 19, 1995, for complaints of "left knee crackling and pain of seven years' duration and right knee crackling and pain of five years' duration." Claimant related that he continued to work but noted increasing pain in about March 1991 which he reported to the yard hospital. He stated he had no one precipitating injury, accident or traumatic event, but felt the symptoms coming on as a result of excessive kneeling and crawling over the years. Claimant reported treating with Drs. Browning and Cambridge for his knees. (EX-2, pp. 1-2; EX-24).

On physical examination, Dr. Willetts observed that Claimant's knees were unremarkable, with full range of motion and negative McMurray's tests. Claimant reported tenderness of the right knee. Motor and sensory exams were normal. X-rays were normal.

Dr. Willetts reviewed certain records of Dr. Cambridge from 1991 through 1995. A diagnosis was made of chondromalacia patellofemoral joint left and probable right knee, status-post resection of congenital large synovial plica and partial resection of medial meniscal tear. (EX-2, pp. 4-5). Dr. Willetts opined that Claimant should avoid squatting and kneeling but otherwise could work without restrictions. Claimant had reached maximum medical improvement on April 18, 1995. (EX-2, p. 5). Based on the AMA Guides to the Evaluation of Permanent Impairment (Guides), Dr. Willetts assigned an impairment rating of 20%, apportioned at a 7% permanent partial impairment for the left lower extremity attributable to the

work-related events of March 1991 with the remaining 13% apportioned to the pre-existing congenital synovial plica. (EX-2, p. 6).

On December 16, 1999, Dr. Willetts examined Claimant for complaints of right knee pain and cracking of eight and one-half years' duration. Claimant had been treating with Dr. Cambridge for his right knee condition. (EX-7, pp. 1-2). Claimant reported increased discomfort with walking, using stairs, squatting, pivoting, flexing and extending the knee and with wet weather. He estimated he could stand for one hour, drive for two hours, walk between two blocks and one mile, and sit without difficulty. Claimant stated he lost no time from work because of his right knee problem. (EX-7, p. 2).

Dr. Willetts noted that a review of systems "was said to be positive for some asbestosis," occasional chest pain and smoking three-quarters of a pack of cigarettes a day with no history of finger numbness or tingling. An inspection of the right knee was normal, with no swelling, atrophy or tenderness and normal range of motion. Dr. Willetts reviewed records from Dr. Cambridge from 1996 through October 1999. His diagnosis was chondromalacia right patellofemoral joint with no sign of significant degenerative arthritis or internal derangement.

He opined Claimant is partially disabled as a result of his right knee condition and is currently working with restrictions. (EX-7, p. 5). He agreed with the assigned restrictions and accommodations as stated by Dr. Cambridge. He further opined that Claimant had reached maximum medical improvement on March 5, 1991 and assigned a 5% permanent partial impairment of the right lower extremity. He disagreed with a 25% impairment rating assigned by Dr. Cambridge because of a lack of physical findings supportive of such an impairment rating. (EX-7, p. 6).

On April 23, 2003, at the request of Employer, Dr. Willetts again examined Claimant for complaints of neck pain of seven to nine years' duration, low back pain since approximately 1999 but increased on March 23, 2001, bilateral knee cracking and discomfort and tingling of the hands of three to four years' duration. (EX-23, p. 1).

Claimant reported his prior treatment with Drs. Browning and Cambridge. He described clicking, popping and stiffness of his knees with increased discomfort getting up from a chair, going up stairs, squatting, kneeling, pivoting, flexing his knee

and with cold, wet weather. He stated he could stand for 20 minutes, drive for one hour and walk for one mile.

Claimant reported he had struck his hard hat overhead a number of times and injured his neck about seven or nine years ago with Employer, but did not go to the yard hospital for treatment. He noticed some gradual hand tingling three or four years ago and "put in a claim" in November or December 2000. He was sent to Dr. Tauro for neurological consult by his attorney. He was told after an MRI that he had arthritis and a disc collapse at C5-6-7. Dr. Tauro sent him to physical therapy for his neck at the yard hospital. (EX-23, pp. 2-3). He was prescribed Vioxx and had no other treatment for his neck problems. Dr. Tauro believed his hand symptoms came from his neck.

Claimant also reported some numbness over the left, greater than the right, ulnar forearms, small and ring fingers and felt some weakness in the same distribution. Claimant reported no treatment for his hands although he was evaluated by Dr. Wainwright in 2001. He had lost no time from work because of his hands or neck. (EX-23, p. 3).

Claimant stated he first injured his back in 1999 at work, but did not report it to the yard hospital. He informed Dr. Willetts that he was carrying heavy gear in tight compartments on March 23, 2001, when he noticed increased back pain which he reported to the yard hospital. He was already taking Vioxx for his neck problem. He had no treatment for his back other than the single visit to the yard hospital. He had no radiation to his lower extremities from his back pain. His back pain increases with activity, such as lifting, flexion, extension, reaching and walking. He reported he could sit for 25-30 minutes, drive for one hour, stand for one-half hour and walk for one mile.

Claimant stated he had been off work since September 13, 2001, because of a significant medical problem with his lungs and heart. (EX-23, p. 4). He underwent aortic valve replacement in December 2001. He reported that he was "on total disability for his heart and is on Social Security Disability." (EX-23, p. 5).

On physical examination, his neck was normal to inspection with no atrophy, swelling or spasm, but some tenderness. Range of motion of the neck was normal. (EX-23, p. 6). Claimant had some decreased sensation on pinprick over the lateral left arm

as well as the left ring finger, but otherwise pinprick sensation was normal. His back examination was normal with no spasm or muscle guarding. Range of motion of the back was normal, however simulated axial rotation "was claimed to be painful, a finding of inconsistency." (EX-23, p. 7). Straight leg raising was negative in both seated and supine positions. Claimant's right knee was normal to inspection with normal range of motion, no swelling, atrophy or reported tenderness. The left knee was also found to be normal to inspection with no swelling, atrophy or reported tenderness and normal range of motion. (EX-23, p. 8).

Dr. Willetts reviewed Claimant's cervical MRI of February 14, 2001, which showed some posterior protrusion of the C6-7 disc, bone ridges posterior to C4 and disc bulging at C4-5 and C5-6. He also reviewed various medical records and reports from Drs. Browning, Cambridge, Tauro, Wainwright and Milstein, Employer's yard hospital records, Vascular Associates reports and notes from Norwich Physical Therapy. (EX-23, pp. 9-13). His pertinent diagnoses were: cervical disc protrusion, degenerative cervical disc disease and arthritis, status-post neck sprains; status-post lumbar sprain; bilateral chondromalacia of the patellofemoral joints-knees; mild bilateral hand neuropathy; status-post aortic valve replacement; and chronic obstructive pulmonary disease. (EX-23, p. 13).

Dr. Willetts opined that if Claimant's history is correct, his work activity contributed to his neck condition. Although Claimant's history of back injury reported to the yard hospital varied from the history provided Dr. Willetts, nonetheless, he opined that if one of the histories is correct, work contributed to Claimant's back complaints. He opined that no further medical treatment was necessary for Claimant's neck and back condition for which he had reached maximum medical improvement. (EX-23, p. 14).

He assigned a 9% permanent partial impairment rating for Claimant's cervical spine which he attributed to his work activities for Employer. (EX-23, p. 15). He assigned a 0% impairment for Claimant's back condition in the absence of any significant clinical findings, spasm, muscle guarding or credible neurological impairment. He also assigned a 5% permanent partial impairment for Claimant's right lower extremity (right knee) of which he apportioned 3% to his work activities for Employer and 2% to unrelated etiology. He maintained the 20% permanent partial impairment previously assigned for the left knee remained reasonable with 13%

attributable to a pre-existing congenial synovial plica and 7% to his work activities with Employer. (EX-23, p. 16).

Dr. Willetts opined that Claimant's ability to return to work "was determined by his unfortunate cardiac events which required heart valve replacement, and which involves heart muscle damage and associated lung damage." He referred to the cardiologist's opinions which reflect Claimant "cannot do more than sedentary work based on his non-work-related heart condition." He further stated that there would be no additional restrictions over the sedentary restrictions by virtue of Claimant's neck, back, hand and knee complaints. However, "he would be able to work at a significantly more than sedentary level of activity were it not for his heart and medical complaints." (EX-23, p. 18).

Dr. Willetts assigned the following restrictions with respect to Claimant's neck: avoid lifting more than 25 pounds to the mid-chest level or more than 10 pounds to the shoulders, avoid lifting above the shoulder level, and avoid pushing and pulling more than 50 pounds. No further restrictions were assigned with respect to the hands. With respect to the knees, Claimant should avoid prolonged squatting, kneeling or crawling more than a total of two hours per day. There were no additional restrictions with respect to Claimant's low back. From an orthopedic standpoint, Claimant would be able to sit, stand, walk and drive, so long as he could occasionally change positions as comfort dictated. He could climb and descend ladders and stairs. (EX-23, p. 19).

Dr. Willetts further opined that Claimant is partially disabled as a result of his orthopedic conditions (neck, back, hands and knees), but is not significantly disabled. The orthopedic conditions are not the sole or even a substantial cause of his disability since he has a significant heart condition and has cardiomyopathy, for which he has been placed on permanent disability. Id.

Dr. John P. Tauro

Dr. Tauro, a neurologist, examined Claimant on referral from Dr. Wainwright and rendered a report on January 9, 2001. Claimant's chief complaints were numbness and tingling involving both hands, pain in his elbow and intermittent tremors in his left arm. Dr. Tauro's assessment was that Claimant had some osteoarthritis in his neck as well as ulnar and median

neuropathies primarily in the left arm. Nerve conduction studies and an EMG were recommended. (CX-6).

On February 26, 2001, Claimant presented with his imaging studies of the cervical spine revealing that he had multi-level disc disease at C5, C6 and C7 which correlated well with his EMG abnormalities. Dr. Tauro recommended conservative treatment and prescribed Vioxx and physical therapy.

On October 18, 2002, 18 months later, Claimant returned for follow-up. His interim cardiac medical problems were reported. He had a reduced range of motion and flexion, extension and right and left rotation were all done with discomfort. He complained of back pain radiating into his buttocks which caused him to limp. Dr. Tauro opined that since his treatment for cervical problems, Claimant's extensive medical problems "have disabled him" and "make him unable to go back to gainful employment as a welder/burner at Electric Boat." Since Claimant was short of breath sitting, Dr. Tauro thought "it would be silly" to fill out a form about his limitations. (CX-7; EX-21).

Dr. William A. Wainwright

At the behest of Employer, Dr. Wainwright examined Claimant and rendered a report on May 2, 2001. (EX-13). Claimant's chief complaints were numbness in the left hand with a duration of several months and pain in the forearms and elbow area with use. Dr. Wainwright reviewed certain records of Drs. Cambridge and Tauro and diagnostic testing from The William W. Backus Hospital. (EX-13, pp. 1-2).

After a physical examination of Claimant's hands, fingers, elbows and cervical spine, Dr. Wainwright determined that Claimant had cervical radiculopathy with a mild component of peripheral nerve entrapment syndrome for which he was assigned a 2% impairment of each hand. Since Claimant had used air-powered vibrating tools in the past, an additional 2% impairment of each hand was assigned due to a presumed vibratory white finger disease or a total of 4% impairment for each hand. Dr. Wainwright opined that these injuries were "more likely than not work-related." The impairment did not include Claimant's cervical radiculopathy. No additional work restrictions were assigned as far as hands usage. (EX-13, p. 3).

Electric Boat Hospital Records

On March 23, 2001, Claimant reported to the yard hospital that he "went up and down ladder in the tank and felt pain in lower back." He complained of aching in his low back for the past one year or longer for which he had been treating with Dr. Tauro. He returned to work with restrictions of limited climbing and bending and no lifting over 25 pounds until March 30, 2001. (CX-8; EX-10; EX-11).

On April 25, 1997, April 25, 1998, April 23, 1999 and April 24, 2000, Employer's yard hospital extended Claimant's restrictions and accommodation for his knees until April 24, 1998, April 25, 1999 and April 23, 2000 and April 24, 2001, respectively. (EX-4; EX-5; EX-6; EX-9). Claimant's assigned restrictions and accommodations were again extended on April 24, 2001 to April 24, 2002. (EX-12).

Dr. Nagireddy Kamireddy

On June 22, 1998, Dr. Kamireddy rendered a report in consultation with Dr. L. Basu regarding Claimant's shortness of breath. (CX-3). Claimant reported a history of shortness of breath on exertion for a few months to one year. He related a smoking history of one-half to one pack of cigarettes daily since age 17 and some exposure to asbestos from 1976 to 1996 while employed by Employer. His pulmonary function study showed mild obstructive defect in the smaller airways and mild restriction and reduced diffusion capacity. X-rays and a CAT scan performed at Norwich Radiological Group revealed bilateral pleural thickening, but no mass lesions. (CX-3, p. 1).

On physical examination, Dr. Kamireddy assessed Claimant with bilateral pleural thickening related to asbestos exposure, chronic nicotine abuse and shortness of breath related to his restrictive lung disease secondary to asbestos exposure and COPD. Claimant was prescribed inhalant medications and advised of the need for yearly chest x-rays and pulmonary function tests to follow his lung disease. (CX-3, p. 2).

On September 24, 1999, Dr. Kamireddy responded to inquiries of Counsel for Claimant related to his examination. He opined that Claimant has a permanent impairment from his asbestos exposure and that his restrictive lung disease is most likely due to his asbestos-related pleural and lung disease. He noted that in smoking-related lung disease, usually bronchitis or emphysema, hyperinflation is seen rather than restrictive lung

disease. He assigned a 10% to 25% impairment of the whole person. (CX-4).

A chest x-ray ordered by Dr. Kamireddy on September 1, 2000, at Norwich Radiology Group revealed Claimant's lung fields were mildly emphysematous with multiple calcified pleural plaques, most likely due to asbestosis. Cardiomegaly was also noted. (CX-5).

On September 13, 2001, Dr. Kamireddy was consulted because of Claimant's acute respiratory distress, hypoxemia and COPD exacerbation. A chest x-ray on September 5, 2001, showed chronic obstruction disease/emphysema, moderate cardiomegaly. Pulmonary function tests performed on September 5, 2001 showed mild to moderate restriction, slight decrease in diffusion capacity and mild obstruction. (CX-10; CX-11, p. 1). Claimant was admitted into The William W. Backus Hospital where he was diagnosed with COPD exacerbation and provided supplemental oxygen, nebulizer treatments and steroids. He was discharged on September 16, 2001, to follow-up with Dr. Kamireddy. (CX-11, pp. 5-6; EX-14).

On October 1, 2001, Claimant presented to Dr. Kamireddy in follow-up where his medications were continued and he was taken off work for two weeks. (CX-12).

Dr. Louis V. Buckley

On November 26, 2001, Dr. Buckley examined Claimant who presented with complaints of shortness of breath on exertion. Lung examination showed diminished breath sounds and scattered expiratory wheezing. The remainder of the examination was otherwise unremarkable. Additional diagnostic testing was ordered. Dr. Buckley opined that Claimant had "significant cardiac disease and probably significant obstructive airways disease leading to his current disability." (CX-13).

Dr. Buckley admitted Claimant into Lawrence & Memorial Hospital on December 7, 2001, for dyspnea on exertion and congestive heart failure. Dr. Buckley's impression was critical aortic stenosis, congestive heart failure secondary to aortic stenosis and chronic obstructive pulmonary disease with asbestosis. He recommended cardiac catheterization which was performed on December 10, 2001, by Dr. Peter Milstein. (CX-14; CX-15). Claimant was transferred to St. Francis Hospital on December 10, 2001, where an aortic valve replacement was performed on December 11, 2001, by Dr. S. Jacob Scheinerman.

(EX-15). On December 17, 2001, Claimant was discharged from St. Francis Hospital to a rehabilitation facility feeling much improved. (EX-16; EX-17, p. 1).

On May 15, 2002, Dr. Buckley reported that Claimant's pulmonary function tests were markedly improved over his September 2001 study, which was influenced significantly by his congestive heart failure. Claimant's pulmonary status was regarded as "markedly improved" with the resolution of his aortic valve disease and valve replacement and treatment of cardiomyopathy. Dr. Buckley opined Claimant was "permanently and totally disabled because of a combination of cardiac, pulmonary and orthopedic limitations, specifically cervical arthritis and discogenic disease." (CX-16).

On May 28, 2002, Dr. Buckley rendered an "Attending Physician's Statement" in which he opined Claimant's limitation was dyspnea with exertion and his physical impairment as "Class 4-moderate limitation of functional capacity; capable of clerical/administrative (sedentary) activity. (60-70%)." He did not express an opinion about when Claimant would reach maximum medical improvement. Claimant's prognosis was "fair" and regarding "estimated date of the patient's return to work," Dr. Buckley opined "no return expected." (CX-17).

On August 29, 2002, Dr. Buckley reported Claimant's pulmonary function had improved significantly and assessed Claimant's pulmonary impairment as mild with no ratable impairment. Claimant's pulmonary impairment was "probably contributed significantly by his asbestosis lung disease which has given him some degree of restrictive lung volume impairment." Dr. Buckley further opined however "because of his cardiac status in combination with orthopedic disabilities and some degree of lung impairment, I do think that he no (sic) longer capable of working as a welder." Claimant's impairment was considered permanent. Dr. Buckley concluded that Claimant's "lung disease did not contribute at any substantial way to the development of his cardiomyopathy, which appears to be solely related to his critical aortic stenosis, not previously recognized." (CX-19; CX-20).

Drs. Robert J. Kupis and Mark N. Fiengo

On January 3, 2002, Claimant followed-up his aortic valve replacement with Drs. Kupis and Fiengo. Claimant continued to have shortness of breath and was discharged from the rehabilitation facility on oxygen. (EX-17).

On January 17, 2002, Dr. Kupis reported to Dr. Buckley that from a cardiac perspective Claimant "seems to be healing reasonably well." (EX-19).

On Janury 28, 2002, Claimant underwent an echocardiogram which revealed considerable improvement after his aortic valve replacement. (EX-18).

Dr. Peter Milstein

On February 6, 2002, Dr. Milstein examined Claimant in follow-up. Claimant was "still doing poorly, still very short of breath." Claimant had neck and back pains because of disc problems. He recommended Claimant apply for long term disability and opined "I don't see his returning to work." (CX-20).

On June 7, 2002, Dr. Milstein evaluated Claimant in follow-up. Claimant was doing much better and had lessened shortness of breath. Dr. Milstein's impression was, in pertinent part, "status-post aortic valve replacement, stable. Severe COPD and asbestosis. (CX-18).

On December 16, 2002, Dr. Milstein reported that Claimant's aortic valve replacement was stable without dysfunction, there was no active failure of his cardiomyopathy and he was doing well. (EX-22).

On January 17, 2002 (sic 2003), Dr. Milstein rendered an "Attending Physician's Statement" wherein Claimant's diagnosis was aortic valve replacement, cardiomyopathy, COPD and shortness of breath. The form is obviously misdated "1-17-02" rather than "1-17-03" since Dr. Milstein refers to the date of Claimant's last visit as "6-7-02." He opined Claimant's present limitation was "dyspnea upon exertion." He assessed Claimant's physical impairment as "Class 4-moderate limitation of functional capacity; capable of clerical/administrative (sedentary) activity. (60-70%)." Claimant's prognosis was regarded as "fair," but Dr. Milstein did not render an opinion of when Claimant would reach maximum medical improvement. Dr. Milstein also noted "no return expected" to the query of Claimant's estimated date of return to work. (EX-26).

Dr. Daniel A. Gerardi

On February 23, 2000, at the request of Counsel for Employer, Dr. Gerardi conducted an evaluation of Claimant pertaining to his medical condition, particularly his respiratory disability related to his work exposure.

He was provided "brief records" from Claimant's pulmonologist Dr. Kamireddy from June and September 1999 and a pulmonary function study from May 1999. Dr. Gerardi reviewed Claimant's occupational and social history and noted Claimant had smoked cigarettes since age 17 for a 54-pack year history. Claimant reported increased shortness of breath over the last two years and that climbing stairs produced shortness of breath. He was able to do his work tasks with no change in symptoms with time off, such as on weekends or vacation.

Dr. Gerardi performed a complete pulmonary function study which revealed mild fixed reduction in flow parameters. He opined that there was a restriction "at least in part related to [Claimant's] obesity . . . [and] further evidence for air trapping a mild diffusion abnormality which is consistent with early chronic obstructive pulmonary disease in [Claimant's] level of obesity." (EX-8, p. 4).

Chest x-rays from Electric Boat from 1990-1993 were compared to a film from January 21, 1999, as well as an x-ray performed on the day of the instant examination. Dr. Gerardi opined that pulmonary parenchyma showed prominent bronchovascular markings consistent with chronic obstructive pulmonary disease. Pleural thickening was notable in the 1990 chest x-ray and "slightly more prominent" in the 2000 film. There appeared to be a plaque along the right hemidiaphragm which was confirmed by a CT Scan of June 3, 1998, which showed the plaques are minimal, but bilateral, consistent with asbestos exposure. There was calcification of one of the plaques in the left pleural space.

Dr. Gerardi's pertinent impressions were: chronic obstructive pulmonary disease related to longstanding cigarette smoking; restrictive lung disease secondary to obesity; and asbestos exposure with demonstration of asbestos-related pleural disease in the form of bilateral pleural plaques, without evidence of asbestosis. Based upon a long history of cigarette smoking, physical examination findings, pulmonary function study data and radiographic information, Dr. Gerardi opined that Claimant was primarily suffering from chronic obstructive

pulmonary disease, likely pulmonary emphysema. He found no evidence for occupational lung disease providing a physiologic impairment. He concluded however that Claimant had evidence of asbestos exposure in the form of bilateral pleural plaques with minimal evidence for calcification, which provided no physiologic impairment. He found no evidence of asbestosis or any evidence for malignancy related to asbestos exposure. (EX-8, p. 5).

Dr. Gerardi opined that Claimant would need regular follow-up because his pleural plaques are a marker for asbestos related disease. Using the AMA Guides, Dr. Gerardi ascribed Claimant with a 20% impairment for both lungs and the whole person. Of the impairment, five percent related to restrictive changes related to obesity and the remaining 15% to chronic obstructive pulmonary disease related to longstanding and active cigarette smoking. He determined that Claimant had reached maximum medical improvement. (EX-8, p. 6).

The Contentions of the Parties

Claimant contends he established entitlement to the Section 20(a) presumption that his neck and back injuries are work-related, which Employer failed to rebut. If rebuttal was established, Claimant asserts that it must be determined whether his neck and back injuries combined with his heart and lung conditions to render him permanently and totally disabled. Claimant relies upon the opinions of Drs. Buckley, Tauro and Milstein that he cannot do his former job and can only perform sedentary tasks, which equates to a **prima facie** case of total disability. Thus, Employer must demonstrate suitable alternative employment which it has failed to do since the jobs identified by Ms. Sinatro are not specific in their nature and terms.

Claimant further contends that his work-related neck and back injuries combined with prior work-related conditions, such as his lung, knee and hand problems, and non-work-related conditions, such as his heart problems, to make him permanently totally disabled for which he is entitled to permanent total disability compensation benefits from February 6, 2002 to present and continuing based on his average weekly wage of $771.33.

Employer contends that after Claimant's neck and back injuries on or before March 23, 2001, he continued to work for Employer with restrictions. Employer avers Claimant left its

employment only after his cardiac condition occurred, a superceding event, and that, but for the heart problem, Claimant would have continued to work his former job. Uncontradictorily, Employer asserts that Claimant's lung condition is a medical claim only. Employer maintains that Claimant has a sedentary wage earning capacity of $268.00 to $400.00 per week, for which its vocational expert established suitable alternative employment on June 20, 2003.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. The Compensable Injury

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the Claimant in establishing that a harm constitutes a compensable injury under the Act. Section 20(a) of the Act provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in

> the absence of substantial evidence to the contrary- that the claim comes within the provisions of this Act.

33 U.S.C. § 920(a).

The Benefits Review Board (herein the Board) has explained that a claimant need not affirmatively establish a causal connection between his work and the harm he has suffered, but rather need only show that: (1) he sustained physical harm or pain, and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. Kelaita v. Triple A Machine Shop, 13 BRBS 326 (1981), aff'd sub nom. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986); Merrill v. Todd Pacific Shipyards Corp., 25 BRBS 140 (1991); Stevens v. Tacoma Boat Building Co., 23 BRBS 191 (1990). These two elements establish a prima facie case of a compensable "injury" supporting a claim for compensation. Id.

1. Claimant's Prima Facie Case

Claimant's **credible** subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case and the invocation of the Section 20(a) presumption. See Sylvester v. Bethlehem Steel Corp., 14 BRBS 234, 236 (1981), aff'd sub nom. Sylvester v. Director, OWCP, 681 F.2d 359, 14 BRBS 984 (CRT)(5th Cir. 1982).

Based on the stipulations of the parties, and a review of Claimant's credible testimony and his medical records, I find and conclude that Claimant suffered traumatic injuries to his neck and back over a period of time before March 23, 2001, when Claimant experienced an exacerbation of his back condition while carrying equipment/gear in tight compartments. He credibly testified to neck and back pains which were reported to various treating and consulting physicians. Dr. Willetts opined that Claimant's neck and back injuries and their sequela were work-related.

Thus, Claimant has established a **prima facie** case that he suffered traumatic injuries under the Act, having established that he suffered a harm or pain on and before March 23, 2001, and that his working conditions and activities on various dates could have caused the harm or pain sufficient to invoke the Section 20(a) presumption. Cairns v. Matson Terminals, Inc., 21 BRBS 252 (1988).

2. Employer's Rebuttal Evidence

Once Claimant's **prima facie** case is established, a presumption is invoked under Section 20(a) that supplies the causal nexus between the physical harm or pain and the working conditions which could have cause them.

The burden shifts to the employer to rebut the presumption with substantial evidence to the contrary that Claimant's condition was neither caused by his working conditions nor aggravated, accelerated or rendered symptomatic by such conditions. See Conoco, Inc. v. Director, OWCP [Prewitt], 194 F.3d 684, 33 BRBS 187 (CRT)(5th Cir. 1999); Gooden v. Director, OWCP, 135 F.3d 1066, 32 BRBS 59 (CRT)(5th Cir. 1998); Louisiana Ins. Guar. Ass'n v. Bunol, 211 F.3d 294, 34 BRBS 29(CRT)(5th Cir. 1999); Lennon v. Waterfront Transport, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994). "Substantial evidence" means evidence that reasonable minds might accept as adequate to support a conclusion. Avondale Industries v. Pulliam, 137 F.3d 326, 328 (5th Cir. 1998); Ortco Contractors, Inc. v. Charpentier, 332 F.3d 283 (5th Cir. 2003) (the evidentiary standard necessary to rebut the presumption under Section 20(a) of the Act is "less demanding than the ordinary civil requirement that a party prove a fact by a preponderance of evidence").

Employer must produce facts, not speculation, to overcome the presumption of compensability. Reliance on mere hypothetical probabilities in rejecting a claim is contrary to the presumption created by Section 20(a). See Smith v. Sealand Terminal, 14 BRBS 844 (1982). The testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. See Kier v. Bethlehem Steel Corp., 16 BRBS 128 (1984).

When aggravation of or contribution to a pre-existing condition is alleged, the presumption still applies, and in order to rebut it, Employer must establish that Claimant's work events neither directly caused the injury nor aggravated the pre-existing condition resulting in injury or pain. Rajotte v. General Dynamics Corp., 18 BRBS 85 (1986). A statutory employer is liable for consequences of a work-related injury which aggravates a pre-existing condition. See Bludworth Shipyard, Inc. v. Lira, 700 F.2d 1046 (5th Cir. 1983); Fulks v. Avondale Shipyards, Inc., 637 F.2d 1008, 1012 (5th Cir. 1981). Although a pre-existing condition does not constitute an injury, aggravation of a pre-existing condition does. Volpe v. Northeast Marine Terminals, 671 F.2d 697, 701 (2d Cir. 1982).

It has been repeatedly stated employers accept their employees with the frailties which predispose them to bodily hurt. J. B. Vozzolo, Inc. v. Britton, supra, 377 F.2d at 147-148.

If an administrative law judge finds that the Section 20(a) presumption is rebutted, he must weigh all of the evidence and resolve the causation issue based on the record as a whole. Universal Maritime Corp. v. Moore, 126 F.3d 256, 31 BRBS 119(CRT)(4th Cir. 1997); Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985); Director, OWCP v. Greenwich Collieries, supra.

The instant record is devoid of any evidence supporting a rebuttal of Claimant's **prima facie** case that he suffered neck and back injuries while employed by Employer. Employer does not contend otherwise. Therefore, I find and conclude that Claimant suffers from work-related and compensable neck and back injuries for which Employer is arguably responsible to provide compensation and medical care under the Act.

B. Nature and Extent of Disability

Having found that Claimant suffers from a compensable injury, the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a worker's physical injury and his inability to obtain work. Under this standard, a claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore

Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

C. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News

Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

1. Claimant's Pre-existing Work-Related Orthopedic Conditions

As noted above, Claimant suffered from left and right knee complaints and symptoms for which restrictions of no crawling, squatting, twisting and kneeling were assigned. Accommodations were extended to Claimant by Employer to allow him to leave his work-site 12 minutes early to "walk up the hill." Drs. Cambridge and Willetts assigned permanent impairment ratings of 20% for his left lower extremity and 5% for his right lower extremity. Claimant had reached maximum medical improvement by April 18, 1995 for his left knee and by March 5, 1991 for his right knee.

Dr. Wainwright treated Claimant for his hand complaints which he opined were work-related since Claimant used air-powered vibrating tools in his work and assigned a 2% impairment to each hand for a mild component of peripheral nerve entrapment syndrome and an additional 2% impairment, or a total of 4% for each hand, due to presumed vibratory white finger disease. Dr. Willetts opined that Claimant had a mild bilateral hand neuropathy. No additional orthopedic restrictions were assigned.

2. Claimant's Pre-existing Respiratory Condition

Dr. Kamireddy noted that Claimant had shortness of breath based on a smoking history since age 17 and work exposure to asbestos from 1976 to 1996. Claimant was diagnosed with a mild obstructive defect and mild restriction, reduced diffusion capacity and bilateral pleural thickening, most likely due to asbestos exposure and asbestosis. He was assigned a 10-25% permanent impairment to the whole person, but no work restrictions.

Dr. Buckley examined Claimant for shortness of breath on exertion in November 2001, and admitted him into the hospital on December 7, 2001, for dyspnea on exertion and congestive heart failure. After Claimant's aortic valve replacement, Dr. Buckley reported Claimant's pulmonary function tests were markedly

improved, as was his pulmonary status. By August 2002, Dr. Buckley opined Claimant's pulmonary function was improved significantly and assessed as mild with no ratable impairment. Dr. Buckley never assigned Claimant any physical restrictions based on his pulmonary condition.

Dr. Gerardi evaluated Claimant for his respiratory disability. His impressions were chronic obstructive pulmonary disease related to longstanding cigarette smoking, restrictive lung disease secondary to obesity, asbestos exposure with demonstrated asbestos-related pleural plaques, without evidence of asbestosis. He found no evidence of occupational lung disease, but concluded Claimant had evidence of asbestos exposure. He assigned a 20% impairment for both lungs and the whole person, and opined Claimant would need regular follow-up because his pleural plaques are a marker for asbestos-related disease. No physical restrictions were assigned. Thus, Employer contends that Claimant's respiratory claim is currently a medical claim only, which is not disputed by the Claimant. I so find and conclude based on Dr. Gerardi's opinion.

3. Claimant's compensable neck and back injuries

In January 2001, Dr. Tauro opined that Claimant had osteoarthritis in his neck and ulnar and median neuropathies of the left arm. Claimant had multi-level disc disease at C5, C6 and C7 in February 2001. In October 2002, after the advent of his cardiac problems, Claimant returned for follow-up complaining of back pain radiating into his buttocks. Dr. Tauro opined that, since his treatment for cervical problems, he had developed extensive medical problems which have disabled him from gainful employment as a welder/burner with Employer. Since Claimant was short of breath sitting, Dr. Tauro thought it silly to assign any limitations.

Dr. Wainwright determined Claimant had cervical radiculopathy and assigned impairments to his hands, which did not include his cervical problems. No other impairments were assigned by Dr. Wainwright.

Employer's hospital records reveal that after Claimant sought medical attention for his back pain on March 23, 2001, he returned to work with restrictions of limited climbing and bending and no lifting over 25 pounds for one week.

On April 23, 2003, Dr. Willetts evaluated Claimant for his neck and back problems of long duration. He noted Claimant had

lost no work from his neck or back problems. Claimant's neck and back were both normal upon physical examination. He reviewed radiographic and diagnostic testing and diagnosed Claimant with, inter alia, cervical disc protrusion, degenerative cervical disc disease and arthritis, status-post cervical sprains and status-post lumbar sprains. He concluded Claimant's neck and back problems were work-related, but no further treatment was necessary for either condition and that Claimant had reached maximum medical improvement for his neck and back injuries. He assigned a 9% permanent partial impairment rating for Claimant's cervical spine attributable to work activities with Employer. In the absence of objective signs and findings, a 0% impairment rating was assigned for Claimant's back condition.

Dr. Willetts assigned restrictions for the cervical condition of avoiding lifting more than 25 pounds to the mid-chest level or more than 10 pounds to the shoulders, avoid lifting above the shoulder level and avoid pushing and pulling more than 50 pounds. There were no additional restrictions for the hands or low back complaints. From an orthopedic perspective, Claimant would be able to sit, stand, walk and drive with occasional changes in position for comfort. He could climb and descend ladders and stairs.

Ms. Sinatro opined that Claimant's former job as a welder was medium in exertional demands and his maintenance work was considered heavy.

Dr. Willetts opined that Claimant's ability to return to work was determined by his unfortunate cardiac events and associated lung damage. He noted that Claimant's cardiologist restricted him to no more than sedentary work and Dr. Willetts opined he would assign no additional restrictions "over the sedentary restrictions," because of Claimant's neck, back, hand and knee complaints. Dr. Willetts observed, however, that Claimant would be able to work at a significantly more than sedentary level were it not for his heart and medical complaints. Claimant was only partially disabled because of his orthopedic conditions, and not significantly disabled according to Dr. Willetts. The orthopedic problems were not the sole or even a substantial cause of Claimant's disability since the occurrence of his heart condition.

Notwithstanding the myriad of restrictions and assigned impairments emanating from his pre-existing orthopedic and respiratory conditions, Claimant continued to work for Employer

with restrictions, which Employer accommodated, with good attendance until September 13, 2001, when he developed cardiac problems. Clearly, Claimant was capable of performing his former job with accommodations and earning his average weekly wage during the period from his March 23, 2001 back injury to September 13, 2001. I find that such modified employment constituted suitable alternative employment with no loss of wage earning capacity. See Darby v. Ingalls Shipbuilding, Inc., 99 F.3d 685, 688 (5th Cir. 1996)(internal placement of a partially disabled claimant within assigned restrictions is sufficient to discharge an employer's burden of establishing suitable alternative employment).

Claimant has not returned to work since September 13, 2001. He acknowledged that the only reason he left employment with Employer was because of his breathing and heart problems, which have improved "to a point" since his aortic valve replacement. He had ideas of working for Employer until "the end of the contract which was 2004." (Tr. 45).

Accordingly, I find that Claimant is not entitled to any compensation disability benefits prior to September 13, 2001, since he continued to retain his pre-injury [March 23, 2001] wage earning capacity.

4. The Alleged Superceding Cardiac Event

Following his September 2001 hospitalization with COPD exacerbation, Claimant was again hospitalized on December 7, 2002 for dyspnea on exertion and congestive heart failure. On December 11, 2001, Claimant underwent aortic valve replacement which ultimately improved his pulmonary functioning.

Dr. Buckley opined that Claimant had chronic obstructive pulmonary disease with asbestosis and chronic heart failure secondary to critical aortic stenosis. He further opined that Claimant was permanently and totally disabled because of a combination of cardiac, pulmonary and orthopedic limitations, specifically cervical arthritis and discogenic disease, which precluded Claimant from working as a welder. He assigned Claimant to moderate limitations of functional capacity capable of "clerical/administrative (sedentary) activity. (60-70%)." Inconsistently, having assigned work limitations within the sedentary range or arguably less, Dr. Buckley noted that he did not expect Claimant to return to work.

On January 17, 2003, Dr. Milstein assessed Claimant's physical impairment as "Class 4-moderate limitation of functional capacity; capable of clerical/administrative (sedentary) activity. (60-70%). He opined that he did not expect Claimant to return to work.

Employer argues Claimant's September 2001 cardiac condition and its sequela constitute intervening or superceding events which terminate its liability for his work-related condition. Claimant contends that his orthopedic and respiratory injuries combined with his cardiac condition rendering him permanently and totally disabled.

If there has been a **subsequent non-work-related injury or aggravation**, the employer is liable for the entire disability if the second injury is the natural consequence or unavoidable result of the first injury. Atlantic Marine v. Bruce, 661 F.2d 898, 14 BRBS 63 (CRT)(5th Cir. 1981); Cyr v. Crescent Wharf & Warehouse Co., 211 F.2d 454 (9th Cir. 1954)(if an employee who is suffering from a compensable injury sustains an additional injury as a natural result of the primary injury, the two may be said to fuse into one compensable injury); Mijangos v. Avondale Shipyards, 19 BRBS 15 (1986).

If, however, the subsequent injury or aggravation is **not** a natural consequence or unavoidable result of the work injury, but is the **result of an intervening cause** such as the employee's intentional or negligent conduct, the employer is relieved of liability for disability attributable to the subsequent injury originating from an intervening cause. Bludworth Shipyard v. Lira, 700 F.2d 1046, 15 BRBS 120 (CRT)(5th Cir. 1983); Marsala v. Triple A South, 14 BRBS 39 (1981); Colburn v. General Dynamics Corp., 21 BRBS 219, 222 (1988); Grumbley v. Eastern Associated Terminals Co., 9 BRBS 650 (1979); See also Bailey v. Bethlehem Steel Corp., 20 BRBS 14 (1987).

Where there is no evidence of record which apportions the disability between the primary and related secondary injuries it is appropriate to hold the employer liable for benefits for the entire disability. Plappert v. Marine Corps Exchange, 31 BRBS 13, 16 (1997), aff'd 31 BRBS 109 (en banc); Bass v. Broadway Maintenance, 28 BRBS 11, 15-16 (1994); Leach v. Thompson's Dairy, Inc., 13 BRBS 231 (1981).

Moreover, if there has been a subsequent non-work-related event, an employer can establish rebuttal of the Section 20(a) presumption by producing substantial evidence that Claimant's

condition was caused by the subsequent non-work-related event; in such case, employer must additionally establish that the first work-related injury did not cause the second accident. See James v. Pate Stevedoring Co., 22 BRBS 271 (1989).

Although Claimant has established entitlement to the Section 20(a) presumption for his traumatic injuries, I find he has failed to establish the presumption for his cardiac condition.

In the present matter, there is no record evidence that Claimant's cardiac condition, which occurred outside work, is directly or indirectly work-related. Nor is there any evidence that his subsequent heart condition was a natural consequence or unavoidable result of his work-related traumatic and lung conditions. In fact, contrary to Claimant's contention of contribution or a nexus between a pre-existing heart ailment and Claimant's lung condition, Dr. Buckley specifically opined that Claimant's lung condition did not contribute in any substantial way to the development of his cardiomyopathy, which appeared to be solely related to his critical aortic stenosis. Thus, I find and conclude that there is no causal relationship between Claimant's heart condition and his work-related injuries.

Furthermore, there is no record evidence that Claimant's cardiac condition was aggravated, accelerated or rendered symptomatic by a work accident or his working conditions. Thus, I find that Claimant has failed to establish a **prima facie** case that his cardiac condition is a work-related, compensable injury. Employer has no rebuttal burden under these circumstances.

Moreover, based on the record evidence, I find and conclude Claimant's subsequent cardiac condition was unquestionably not the natural consequence or unavoidable result of his work-related injuries, but rather the result of an intervening or superceding event which relieves Employer of liability for disability attributable to the subsequent cardiac event. See Marsala, at 42. "The fundamental intent of the Act is to compensate employees for the loss of wage-earning capacity attributable to an employment-related injury, but no more." Id., at 43.

As the Board noted in Marsala:

> "the Act does contemplate apportionment of liability in cases involving subsequent injuries occurring

> outside of work, where the subsequent injury does not result naturally or unavoidably from the primary, work-related injury. In such cases, the employer is liable only for the disability arising from the primary injury. To hold otherwise would be to require employers to compensate employees for injuries over which employer had no control, and which had no relation to the primary injury."

14 BRBS 42.

Further, it is clear that Claimant's heart condition **increased** his restrictions and thus his disability since he cannot return to his former job as a welder. As a result of his cardiac condition, he was restricted to a sedentary or less exertional or functional capacity which precluded his return to his former job, as modified to conform to his orthopedic and lung restrictions. **But for his heart condition**, Claimant would have continued working for Employer in his former job as modified earning his average weekly wage. His work-related injuries did not preclude his continued employment with Employer.

Contrary to Claimant's contentions, his orthopedic problems were not considered significant and only partially disabling by Dr. Willetts. Such problems were not viewed as the sole or even a substantial cause for his disability after his significant heart problems, for which he was placed on permanent disability. Notwithstanding the opinion of Dr. Buckley that Claimant was permanently totally disabled "because of a combination of cardiac, pulmonary and orthopedic limitations," Dr. Willetts opined that Claimant could perform significantly more than a sedentary level of activity were it not for his heart condition. Claimant was never assigned any restrictions for his pulmonary condition. I find and conclude that Claimant was determined to be permanently totally disabled by Dr. Buckley principally because of his non-work-related cardiac condition, for which Employer cannot be held responsible even in combination with Claimant's orthopedic and lung conditions.

Claimant's plight is arguably analogous to situations in which an injured employee is terminated from employment, or, as in this case precluded from continued employment, for reasons unrelated to his disability. See e.g., Edwards v. Todd Shipyards Corp., 25 BRBS 49, 52 (1991)(an employer is not a long-term guarantor of employment); Walker v. Sun Shipbuilding & Dry Dock Co., 19 BRBS 171, 172 (1986); Ilasczat v. Kalama

Services, 36 BRBS 78, 83 (2002). In such cases, employers are not obligated to re-establish suitable alternative employment or to pay continuing compensation benefits.

Here, after Claimant's traumatic injuries, Employer established suitable alternative employment internally by modifying Claimant's former job which Claimant was clearly capable of performing. Claimant was subsequently further disabled from returning to Employer's modified position because of his non-occupationally-related heart condition rather than because of his work-related disability. Because Claimant may no longer return to work due to reasons which are unrelated to his work-related disability, I find and conclude that Employer was not obligated to identify new or additional suitable alternative employment within the work restrictions assigned to Claimant after his cardiac events.

As the proponent of his position, Claimant has failed to carry his burden of proof or persuasion in establishing that his incapacity to return to work for Employer is related to his job-related traumatic and lung conditions. See Greenwich Collieries, supra. Consequently, I further find and conclude that Claimant is not entitled to any compensation subsequent to the date he could no longer return to modified work, provided internally by Employer, due to his heart condition. Accordingly, Claimant's claim for compensation benefits is hereby **DENIED.**

D. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

In the present matter, Claimant has established that he is entitled to continuing medical treatment and testing associated with his respiratory problem for which I find Employer is responsible. Dr. Kamireddy opined that Claimant needed prescribed inhalant medications and yearly chest x-rays and pulmonary function tests to follow his lung disease. Dr. Gerardi concurred that regular follow-up was needed to evaluate Claimant's pleural plaques which are a marker for asbestos-related disease.

Although Dr. Willetts opined that Claimant needed no further treatment for his neck and back conditions, Claimant continued to credibly complain of back pain at the formal hearing. To the extent Claimant requires medical treatment or care in the future for his work-related knees, hands, neck and back conditions, I find and conclude Employer remains responsible for necessary, reasonable and appropriate care.

ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. To the extent Counsel has successfully prosecuted this matter, Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.[3] A

[3] Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only

service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Claimant's claim for permanent total disability compensation benefits is hereby **DENIED.**

2. Employer/Carrier shall pay all reasonable, necessary and appropriate medical expenses arising from Claimant's traumatic knees, hands, neck and back injuries occurring before March 23, 2001 and his lung condition, pursuant to the provisions of Section 7 of the Act.

3. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported and verified fee application with the Office of Administrative Law Judges; a copy must be served on Claimant and opposing counsel who shall then have twenty (20) days to file any objections thereto.

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the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **November 26, 2002**, the date this matter was referred from the District Director.

ORDERED this 5th day of March, 2004, at Metairie, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge